

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

STERICYCLE, INC.,)	
)	
Respondent,)	
)	
And)	Case Nos. 04-CA-137660
)	04-CA-145466
)	04-CA-158277
TEAMSTERS LOCAL 628)	04-CA-160621
)	
Charging Party)	

**RESPONDENT’S ANSWERING BRIEF TO GENERAL COUNSEL’S AND CHARGING
PARTY’S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION**

NOW COMES Stericycle, Inc., Respondent herein, and files its Answering Brief to General Counsel’s and Charging Party’s Exceptions to Administrative Law Judge’s Decision, as follows:

STATEMENT OF ISSUES

The General Counsel’s and Charging Party’s exceptions raise the following issues:

1. Whether Respondent’s Use of Personal Electronics in the Workplace policy violated § 8(a)(1) of the Act? [GC Exception No. 1; CP Exception Nos. 7, 8, 9, 22, 23, 24, 25, 26, 27]
2. Whether Respondent’s Electronics Communications policy violated § 8(a)(1) of the Act? [GC Exception No. 2]
3. Whether Respondent violated § 8(a)(5) of the Act by refusing to bargain over the recoupment of health insurance premiums? [CP Exception Nos. 1, 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21]

4. Whether Respondent violated § 8(a)(5) of the Act by refusing to furnish earnings statements requested by the Union? [GC Exception Nos. 3, 4; CP Exception Nos. 3, 4, 5, 6, 28, 29, 30, 31, 32, 33, 34, 35]

5. Whether Respondent violated § 8(a)(5) of the Act by refusing to furnish TMX survey slides regarding facilities not represented by the Union? [GC Exception No. 5; CP Exceptions Nos. 41, 42]

6. Whether Respondent violated § 8(a)(5) of the Act by refusing to furnish bargaining proposals related to article 22.3 of the Southampton collective bargaining agreement? [CP Exception Nos. 36, 37, 38]

7. Whether Respondent violated § 8(a)(5) of the Act by refusing to furnish information regarding a supervisor's disciplinary records? [CP Exception Nos. 39, 40]

ARGUMENT

A. The Judge Correctly Dismissed The Allegations Regarding The Use of Personal Electronic Devices Policy.

The ALJ dismissed the allegation that Respondent's policy regarding the use of personal electronic devices was unlawful. (JD 24: 30-35).¹ The General Counsel and the Union have filed exceptions to this conclusion. The policy,² as set forth on page 28 of the handbook distributed to the Morgantown employees, provides:

The use of personal cell phones or other personal electronic devices such as MP3 players is prohibited in waste processing, warehouse, loading and unloading areas during operating hours and any areas subject to vehicle movement at any time. The following are some

¹ References to the ALJ's decision are designated as "JD" followed by the appropriate page and line numbers.

² The separate policy introduced by the General Counsel as GC Exhibit 31 is not materially different from the handbook language cited above. Thus, Respondent will discuss both policies together as a single policy.

examples of personal electronic devices, however this list is not all inclusive: Smartphone, MP3/MP4 players, Bluetooth devices (e.g. earbuds/headphones), portable DVD players, e-readers and portable gaming systems. Company issued mobile phones may be used by managers or supervisors in these areas only when such use is required for conducting company business. *Personal mobile phones and all other personal mobile electronic devices are to be kept in the team member's locker. Personal phone calls and use of personal electronic devices shall be restricted to meal and break periods. Violation of this policy may result in disciplinary action up to and including termination.*

(GC Exh. 2, p. 28).

The General Counsel and the Charging Party do not contend that Respondent's policy specifically addresses Section 7 activity, was adopted in response to Section 7 activity, or has ever been applied to restrict Section 7 activity. The General Counsel acknowledges that the ALJ's reading of the policy is reasonable, but argues that this is not the only reasonable reading. (GC Brief at 21). The General Counsel and the Charging Party both contend that the policy is not narrowly drawn to protect Respondent's business interests. (GC Brief at 21; CP Brief at 13). These contentions are without merit.

Although the policy prohibits the use of personal cell phones and electronic devices in areas where work is being performed, it expressly permits employees to use personal cell phones during non-working time and does not restrict the purposes for which cell phones and personal electronic devices may be used by employees during non-working time. Thus, the General Counsel's challenge to this policy turns on the novel proposition that employees have a statutory right to bring personal cell phones and electronic devices into the working areas of an industrial facility, to maintain those devices on their person during working time, and to utilize those devices in work areas of the facility even when work is being carried on, irrespective of any obligations imposed upon the employer to provide a safe working environment.

With respect to the policy's application to personal electronic devices such as MP3 devices and e-readers, the ALJ easily rejected the General Counsel's contention. Listening to music, reading books, and playing games may be worthwhile activities, but they do not constitute conduct protected by the Act. And these types of devices are not mediums of communication between employees. To the contrary, they tend to promote solitude by the employee who is utilizing the device. Respondent is unaware of any Board or court decision, or even any plausible legal theory, which would prohibit an employer from restricting, or even banning outright, the use and possession of personal music and reading devices.

As for personal cell phones, the General Counsel relies on the Board's decisions in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), *T-Mobile USA*, 363 NLRB No. 171 (2016), and *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), where the Board found unlawful certain policies banning employees from taking pictures and making video/audio recordings during non-working time. These decisions, however, are wholly inapplicable to the instant personal electronics device policy because that policy says absolutely nothing about taking pictures or making video/audio recordings. It merely regulates where personal cell phones must be maintained and where and when they may be used. As then-Member Johnson observed (n. 12) in his dissent in *Rio-All Suites*, "there is no Sec. 7 right to *possession* of a camera or other recording device by employees on an employer's property." The majority did not expressly reject that proposition, as the policy in question addressed only the use of recording devices, not the possession of such devices.

To be sure, one must possess a recording device in order to be able to use it, but with the exception of actual Section 7 *communications* (literature, pins, buttons, caps, etc.), the Board has never, to Respondent's knowledge, held that employees have a statutory right to possess any

specific personal property while *inside* their employer's work facility simply because that property might *facilitate* Section 7 activity. There are many devices that conceivably might aid employees in engaging in Section 7 activities: cameras, cell phones, DVD players, laptop computers, PA systems, megaphones, portable booths, card tables, tape recorders, binoculars, portable printers, facsimile machines, to name some that come to mind. If an employer permits employees to possess and use such devices inside its facility, it may not discriminate based on Section 7 activity, but employees do not have a statutory right to possess or use these devices inside their employer's facility. As Respondent's policy merely addresses where and when personal cell phones may be used and does not proscribe the purposes for which cell phones may be used, it cannot reasonably be read as restricting Section 7 activity.

Even if the policy could be construed as restricting Section 7 activity in some respect, the limited impact on Section 7 activity is far outweighed by the substantial business justifications for the policy. Respondent's Morgantown facility is a medical waste processing facility. Employees unload boxes and containers of medical waste, which can be dripping with bodily fluids. Employees wear extensive protective equipment in order to handle such waste, including gloves that make it impractical to handle mobile devices. The waste is moved through the facility in wheeled vehicles and processed through large pieces of equipment which shred the medical waste. The dangers inherent in using cell phones, MP players, earbuds, and other devices in operating and vehicular traffic areas of the facility are self-evident. Such use not only creates safety hazards, but it invites careless errors and mishandling of medical waste. (Tr. 141-144).

Respondent requests that the Board adopt the ALJ's dismissal of this allegation.

B. The Judge Correctly Dismissed The Allegations Regarding The Electronic Communications Policy.

The General Counsel takes exception to the ALJ's dismissal of the allegation that Respondent's Electronic Communications Policy was unlawful. The introductory paragraph to this policy provided:

Stericycle has established a policy relating to access and disclosure of electronic messages created, sent or received by team members using the Company's voicemail system, or an authorized internet email service. The Company intends to honor the policies set forth below, but reserves the right to modify, change or revoke them at any time as may be required under the circumstances. Use of the Company's voicemail/email equipment for electronic communications constitutes a team member's affirmation and acceptance of this Company policy. *A substantial portion of our business is transacted by telephone and over the wide area network. Therefore in order to maintain the efficiency of these systems non-business usage must be restricted. Phone and data lines must be kept open for business purposes. Accordingly, personal telephone calls and email should be infrequent and brief, and limited to urgent family matters.* Since the telephone, company-issued cell telephones and voicemail system are company property, Stericycle reserves the right to access voicemail messages at any time with no notice. Team members should have no expectation of privacy or confidentiality as to the content. Emergency calls to team members should be routed directly to the Supervisor so the team member can be located to accept the call.

(GC Exh. 22, p. 26)

The General Counsel challenges only the highlighted language in this policy. On its face, this language does not explicitly restrict Section 7 activity, and there is no contention or evidence that it has been applied to restrict Section 7 activity. Thus, the question becomes whether it can be reasonably read to restrict Section 7 activity, which turns on the extent to which employees have a Section 7 right to use an employer's telephone and email systems. In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the Board overruled prior precedent, and held:

[W]e will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

(Slip. Op. at 14).

The Board expressly limited its decision to use of an employer's email system and expressly chose not to address other types of electronic communications systems. And the right it recognized "applies only to employees who have been granted access to the employer's email system in the course of their work and does not require employers to provide access." (Slip. Op. at 14-15).

The General Counsel argues that the Judge incorrectly found that the record failed to establish that any employees have been provided access to Respondent's email system. Thus, it is asserted that the Judge found the handbook to be "nationwide" in scope and that the policy in essence acknowledges that employees have access to the email system. (GC Brief at 23). As set forth in Respondent's Exceptions and its Brief in Support of Exceptions, however, the record does not establish that the handbook in question was implemented or maintained at any facility other than Morgantown. But even if this inference could be drawn, there is no basis on which the Board could further infer that statutory employees at Morgantown or any other facility have been granted access to Respondent's email system. The policy does not describe *who* has access to the email system. It merely sets forth the conditions under which access is granted *if* an employee's job allows him or her to access the email system. As the Judge recognized, however, the record contains extensive evidence that individuals who do not qualify as statutory employees (supervisors and managers) have access to the email system, but not an iota of evidence of any such access by statutory *employees*. (JD 28: 10-18). An essential element of General Counsel's

case is that at least one statutory employee has been granted access to Respondent's email system as part of their work.

The Board's decision in *Purple Communications* presumes that employees who have been granted access to the employer's email system may use such email system for Section 7 purposes during non-work time. It establishes no presumption at all with regard to whether or not employees have been granted such access. That is an issue on which the General Counsel carries the burden of proof. In *Purple Communications*, the General Counsel established that employees in question were video relay interpreters who routinely used company computers throughout the day and who had assigned email accounts. Here, the Morgantown employees perform manual labor inside a plant that involves handling medical waste. There is no evidence that they had Company email accounts, and the nature of their work precludes drawing an inference of access to the Company's email system. *See Shamrock Foods Co.*, 2016 WL 555903, Case No. 28-CA-150157 (2016, ALJ Jeffrey D. Wedekind). Respondent requests that the Board adopt the ALJ's dismissal of this allegation.

C. The Judge Correctly Concluded That Respondent Did Not Unlawfully Fail To Bargain Over The Recoupment Of Health Care Premiums.

It is undisputed that employees were contractually obligated to contribute 1% of their pay to the cost of health insurance, that it took Respondent several months to implement the deductions, and that Respondent recouped the amounts not deducted over three bi-weekly pay periods beginning on September 12, 2014. In dismissing the allegation that Respondent unilaterally changed employee terms and conditions of employment by taking these deductions, the Judge concluded that although the Union had insufficient notice with respect to the first deduction, the amount deducted was not sufficiently large to constitute a material and substantial change. (JD 21: 1-6, 30-35). With respect to the second and third deductions, he concluded that

these were sufficiently large to constitute substantial and material changes, but that the Union waived any right to bargain. (JD 21:37-40; 22: 1-7). The Union has filed exceptions to the Judge's findings and his dismissal of this allegation. The Union contends that the Judge erred by analyzing the first deduction separately from the second and third deductions, and that viewed as a single plan, the Union did not waive the right to bargain by insisting that the first deduction be rescinded before it would bargain over the second and third deductions. It further argues that whether viewed separately, or as a whole, the deductions were substantial and material. (CP Brief at 4-8).

Although Respondent agrees with the ALJ's dismissal of this allegation, it has taken exception to his findings that Respondent did not provide the Union with sufficient advance notice of the first deduction, that the Union did not waive its right to bargain over this deduction, and that the second and third deductions were "substantial" and material. These exceptions are discussed fully in Respondent's Brief in Support of Exceptions, but are also discussed herein to the extent that the Union's arguments intersect with Respondent's contentions.

Respondent agrees, in part, with the Union's contention that there is a certain inconsistency in the Judge's analysis of the three deductions. That inconsistency, however, is more apparent than real, and it largely disappears *if* the Judge correctly concluded that the Union did not waive its right to bargain over the first deduction because Respondent gave it insufficient notice. It is beyond dispute that the Union was provided ample notice of the second and third deductions and that it adamantly refused to bargain unless Respondent reversed the first deduction. Further, Respondent explicitly offered to hold off on making these deductions until after bargaining had occurred. Having concluded that the Union did not waive the right to bargain over the first deduction, the ALJ necessarily viewed the second and third deductions as

being of a separate piece. Respondent's own actions had bifurcated what initially may have been a single decision into two separate and independent issues. Respondent placed no restrictions at all on the Union's ability to bargain over the second and third deductions, and the Union's ability to bargain was not hindered in any respect by the fact that the first deduction had already been processed. This is unlike *S & I Transportation, Inc.*, 311 NLRB 1388 (1993), cited by the Union. In that case, following an election won by the union, the employer unilaterally announced to employees that it was changing to a bi-weekly payroll. After the union threatened to file a charge, the employer met with the union ostensibly to discuss a planned wage and benefit reduction necessitated by the employer's poor financial condition, but its offer to bargain was belied by its actions, which included refusing to waive its challenge to the union's certification and its prior announcement of unilateral action. Further, there was no offer to hold off on the planned reductions pending further bargaining.

Of course, Respondent contends that the Judge erred in finding that the Union did not waive its right to bargain over the first deduction. As set forth in Respondent's Brief in Support of Exceptions, the Union was notified in advance and had sufficient time to request bargaining, but chose to content itself with disputing Respondent's legal and contractual right to make the deductions. If, as Respondent contends, the Union waived its right to bargain over the first deduction, as well as the second and third deductions, it does not matter whether the three deductions are viewed separately or as a single action.

As for the amount of the three deductions, Respondent contends that, whether viewed separately or in combination, they were not sufficiently substantial to require bargaining. Contrary to the Union's contention, there was no "pay cut." (CP Brief at 5). Employees were paid every penny to which they were entitled. The maximum total hours of pay recouped by

Respondent was roughly 6.9 hours of pay compared to 5 hours pay in *Alexander Linn Hospital Assoc.*, 288 NLRB 103 (1988), *enf'd sub nom. NLRB v. Wallkill Valley General Hosp.*, 866 F.2d 632 (3d Cir. 1989). Respondent contends that the amounts deducted by Respondent were no less “insignificant” than the amounts deducted in *Alexander Linn*.

Finally, the Union’s contention that Respondent’s offer to bargain was limited to the “timing” of the deductions is frivolous. (CP Brief at 7-8). Riess’s initial notification of September 5, 2014 requested that Dagle let him know if he had “any questions or concerns.” (Resp. Exh. 1, p. 1). When Dagle finally requested bargaining on September 9, 2014, he indicated that the Union was seeking bargaining over the “recoupment schedule.” (Resp. Exh. 1, p. 10). Riess responded later that day, offering “to bargain with the union over the timing of the catch-up deductions as announced in our September 3 letter to you and as you request in your communication of today.” (Resp. Exh. 1, p. 12). Riess was not placing limitations on bargaining; he was merely referencing the request made by Dagle. Indeed, the timing was the significant issue, as it would effectively determine when each deduction occurred, the number of deductions, and the amount of each deduction. As for Respondent’s right to recoup the missed contributions, that was a contractual dispute on which the parties were entitled to disagree. The Union chose not to grieve or arbitrate the issue. The Judge correctly dismissed this allegation.

D. The Judge Correctly Dismissed The Allegation That Respondent Unlawfully Refused To Furnish The Union With Earnings Statements.

The General Counsel and the Charging Party both challenge the Judge’s dismissal of the allegation that Respondent unlawfully refused to furnish the Union with historical earnings statements. Only the Union challenges the Judge’s dismissal of the allegation that Respondent unlawfully refused to provide earnings statements on an ongoing basis. Both contentions are without merit.

Respondent does not dispute that historical earnings/payroll information was relevant to the Union's grievance over Article 23.3. The Union, however, was not entitled to insist that the information be provided in the form of actual individual earnings statements. In order to print out these statements, a payroll clerk must access, pull up, and print out these statements one-by-one for each of the roughly 100 Southampton bargaining unit employees. Inasmuch as the Union had requested 15 pay periods of earnings statements, this would have required the clerk to access and print out 1,500 earnings statements. Respondent had estimated that it took roughly 3 to 4 minutes to access and print out each statement. (Resp. Exh. 7; Tr. 277-278). Thus, complying with the Union's request would have taken between 75 and 100 hours of clerical time. Rather than provide the actual earnings statements, Respondent promptly provided a payroll report, which reflected all of the earnings information for each employee, including 401k and stock purchase contributions. (GC Exh. 16). It is true that the report was provided in a pdf format, which required the user to flip through pages and count down in order to match up each column with each employee. (Tr. 299-301). But whatever difficulties the Union may have encountered, there is no evidence that the Union complained about the format in which the information was provided, even looked at what had been provided, or raised any issue until eleven months later (August 2015) when the Union's counsel issued a subpoena for this information in conjunction with the arbitration hearing scheduled for September 10, 2015. This is not particularly surprising inasmuch as at the time that the Union made its initial request on September 5, 2014, it had already demanded arbitration, and the information it was seeking was clearly for use in the arbitration. Thus, the Union had no real need for this earnings information until such time as the arbitration hearing was imminent. When an employer purports to provide responsive information in one format and the union finds this format to be unwieldy, it does not seem unreasonable to

expect that the union will voice its concerns or objections and make a request that the information be provided in a different format. It certainly should not be permitted to wait eleven months to voice any objections, and then complain that the information was not furnished in a timely fashion. That is what occurred here, and in these circumstances, no violation of § 8(a)(5) is warranted based on any later asserted deficiencies in the initial response or any claim of untimeliness.

The allegation of an unlawful refusal to furnish historical earnings information must rise or fall on the basis of Respondent's efforts in August/September 2015 to respond to the Union's subpoena, which mirrored its prior information request. In this regard, the record reflects that on September 4, 2015—six days before the arbitration hearing—Respondent furnished a payroll report in Excel spreadsheet format “containing everything found on the ‘earnings statements’” sought by the Union. Respondent also advised the Union that it had arranged for the Union “to have access to our payroll system for the limited purpose of accessing and printing (if he desires) the ‘earnings statements’ he continues to demand from the Company.” When the Union's counsel responded on September 8, 2015, the only deficiency that he raised was that “the payroll report still does not provide the year-to-date figures printed on the earnings statements.” (Resp. Exh. 8, p. 2). Approximately 90 minutes later, Respondent's counsel replied, attaching a summary payroll report for 2014 and 2015, as well as the log-in information for the Union to directly access the employees' earnings statements. (Resp. Exh. 8). The summary report, which was also in an excel spreadsheet format, provided the yearly totals requested by the Union's counsel.

The General Counsel cites *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), but that case is wholly dissimilar. In *Detroit Newspaper*, the union requested a copy of an

environmental audit. The employer categorically denied this request and furnished nothing in response to the Union's request until shortly before the unfair labor practice hearing (7 months later), at which time it provided a heavily redacted copy. In these circumstances, the Board not surprisingly characterized the employer's response as "too little and too late to meet the Respondent's statutory obligation." Here, in contrast, Respondent promptly provided a payroll report providing the same information requested by the Union. The Union did not complain about the format until prior to the arbitration hearing, at which time Respondent clearly provided the Union with the relevant historical earnings information in a format that was suitable for review. It also provided the Union with access to its payroll system so that it could print the actual earnings statements if it so desired. Respondent requests that the Board adopt the Judge's dismissal of this allegation.

To the extent that the Union's request for future earnings information was in essence a continuing request up until the date of the arbitration hearing, Respondent satisfied that request by virtue of the information that it provided in early September 2015. However, insofar as the Union was seeking to impose upon Respondent an indefinite obligation to furnish earnings statements on a bi-weekly basis, this was not a valid request for information. An employer's obligation to furnish any particular type of information on a periodic basis is certainly a mandatory subject of bargaining, and the parties are free to make proposals in that regard during contract negotiations. For example, it is not unusual for collective bargaining agreements to contain provisions requiring the employer to furnish the Union with updated seniority lists on a periodic (monthly, quarterly, yearly) basis. But Respondent is unaware of any legal precedent that would permit a union to bypass the bargaining process and impose such an obligation simply by making an ongoing information request. If that were the case, a union could unilaterally

impose any number of recurring obligations on the employer to provide periodic information: seniority lists, disciplinary notices, accident reports, job change notices, production reports, quality reports, and so on, simply by making information requests, and the employer would lose its Section 8(d) right to say “no” to Union proposals seeking to impose such obligations. The Union would achieve unilaterally what it could not achieve at the bargaining table. Here, the Southampton CBA imposes no obligation upon Respondent to furnish bi-weekly earnings statements on an ongoing basis. (Tr. 165).

In any event, even if the Union could impose such an obligation by making an ongoing information request, Respondent satisfied that obligation by providing the Union with the ability to directly access the requested information. Although the Union apparently argues that it was unable to print out these statements, the undisputed record evidence is that Respondent assisted the Union in resolving whatever problems it was experiencing, and the Union never thereafter raised any issue with regard to its ability to access this information. Respondent requests that the Board adopt the judge’s dismissal of this allegation.

E. The Judge Correctly Dismissed The Allegations Regarding The TMX Survey.

The only issue posed with regard to the TMX survey is whether the Union was entitled to information reflecting the survey results at other Stericycle facilities. As this information clearly related to facilities and employees not represented by the Union, the burden was on the Union to assert some special need. The General Counsel and the Union argue that the Union needs to know how the satisfaction of Respondent’s employees compared with that of Stericycle employees elsewhere; i.e., did Morgantown score higher or lower on their responses to certain statements than other facilities. But this explanation falsely assumes that the Union’s bargaining rights turn on how Morgantown employees responded in comparison to how non-unit employees

responded to these same statements. The Union's representation rights are limited to Morgantown and comparisons to other facilities are irrelevant. What difference could it possibly make if Morgantown employees were more or less satisfied than other Stericycle employees? If this explanation were sufficient to make non-unit information relevant, there would be no meaningful limitation on a union's right to obtain information regarding employees employed at unrepresented facilities.

This is particularly true since the survey did not address wages, hours, and terms and conditions of employment in any detail. Instead, it simply asked employees to rate their agreement or disagreement with broad statements regarding work place satisfaction such as (a) "Overall, I am extremely satisfied with Stericycle as a place to work;" (b) "My work gives me a feeling of personal accomplishment;" (c) "I have opportunities for advancement in Stericycle;" (d) "My manager does a great job at managing the work;" (e) "Customer problems are dealt with quickly." (GC Exh. 29 E). As these types of questions do not implicate specific terms and conditions of employment, it is difficult to see what use the Union could make of this information—with or without comparative data. In any event, data related to other facilities is not presumptively relevant, and the Union made no showing that it needs this data in order to represent unit employees.

Respondent requests that the Board adopt the Judge's dismissal of this allegation.

F. The Judge Correctly Dismissed The Allegation Regarding The Union's Request For Copies of Collective Bargaining Proposals and Agreements Reached.

Respondent denied the Union's request for copies of all collective bargaining proposals and agreements regarding the 401k plan on the grounds that (1) the Union already possessed such documents and (2) the request was in essence an effort to engage in discovery. A union has a right to relevant information, but it does not have the right to insist that the employer engage in

pure busy work to produce what the union already possesses. *See Manitowoc Ice, Inc.*, 344 NLRB 1222, 1238 (2005) (no violation for failing “to furnish to the Union information that the Union already possessed”). The employer does have an obligation to advise the union that it has nothing in its possession that the union does not already have. *Kroger Co.*, 226 NLRB 512, 513 n. 10 (1976). Here, the documents requested—proposals and agreements—were obviously in the possession of both parties. Respondent advised the Union that it already had in its possession all proposals and agreements. (GC Exh. 15 B). At no point did the Union ever dispute the accuracy of this assertion. Respondent requests that the Board adopt the Judge’s dismissal of this allegation.

G. The Judge Correctly Dismissed The Allegation Regarding The Union’s Request For Information Regarding Supervisor Ron Lobb.

On November 20, 2014, the Union filed “a formal grievance on behalf of Local 628, Ryan Suobra and the bargaining unit” alleging that “supervisor Ron Lobb egregiously and forcefully placed his hands on, grabbing, pushing and pulling employee Ryan Suobra on Saturday, November 15, 2014.” (GC Exh. 23; Tr. 72). Plant Manager Mike Valtin responded to the grievance on December 5, 2014, as follows:

While the Company does not necessarily agree with the Union’s statement that Ron Lobb’s action toward Ryan Soubra was egregious or forceful, we believe that no Manager or Supervisor should touch an employee. The Company agrees that this behavior is unacceptable and will not be tolerated. Therefore, Mr. Lobb’s unacceptable behavior has been addressed with him per company policy. Harassment Training will be held for all Morgantown Plant Supervisors and Team Members by January 1st, 2015.

(GC Exh. 24; Tr. 73).

Although Valtin had essentially granted the Union’s grievance, Dagle advised Valtin on December 11, 2014, that the Union “intends to proceed to Step 2 regarding the Ryan Suobra

grievance.” Dagle requested six items of information. The only item placed in issue by the Union’s supporting brief is a request for “Copies of all documents, reports, email, etc., in supervisor Ron Lobb’s personnel file regarding similar previous instances of egregious and unacceptable actions on employees.” (GC Exh. 25; CP Brief at 8-12). Plant Manager Mike Valtin denied this request as follows:

Your request regarding the company’s investigation into misconduct and personnel information of a non-bargaining unit employee (items 2-6) are denied because they are not presumptively relevant and you have not provided any reasons to justify their relevance as to any grievance or discipline issued to a bargaining unit employee.

(GC Exh. 27, p. 2).

On January 7, 2015, Dagle responded to Valtin, stating that the basis for the Union’s request was “to evaluate whether the discipline [of Lobb] is sufficient to deter further misconduct against bargaining unit employees.” (GC Exh. 27, p. 2). Valtin replied on January 13, 2015, noting that “Soubra received no disciplinary action resulting from the incident” and that “the Company provided the Union with the discipline to demonstrate its good faith and commitment to its policies and to assure the Union that Mr. Lobb will continue to suffer consequences for violating Company policies, which include inappropriate interactions with coworkers.” Valtin further stated:

The Union does not have any right to grieve or challenge any discipline issued to a non-bargaining unit member. Consequently, your rationale for wanting to review the personnel file of Mr. Lobb—to determine if the discipline issued was appropriate and sufficient—is not related to the Union’s representational duties. As a result, your reasons for wanting the requested information does not overcome Mr. Lobb’s right to confidentiality of his personnel information. Therefore, your request is denied.

(GC Exh. 27, p. 1). There were no further communications between the parties regarding this issue.

Respondent does not disagree with the general principle that the Union has a legitimate interest in protecting unit employees from misconduct by persons outside the bargaining unit. But that interest is not unlimited and must be balanced against the undeniable fact that the Union does not represent statutory supervisors and does not have any right to bargain over Respondent's disciplinary decisions regarding supervisors. Further, the personal privacy interests of supervisors are no less than those of unit employees. Here, Respondent provided the Union with video footage of the incident, and the Union obviously had access to Soubra's version of the incident. Inasmuch as Soubra was never threatened with discipline and Respondent's investigation was focused solely on supervisor Lobb's conduct, the Union knew everything it reasonably needed to know about the incident. Respondent also allowed the Union to view the disciplinary action issued to Lobb. Thus, the Union was able to assure itself that Respondent had addressed the specific incident in issue with Lobb, and it had everything it needed to decide in its own mind whether that discipline was adequate to protect employees.

The *United States Postal Service* decisions cited by the Union at page 10 of its brief are all distinguishable. In *United States Postal Service*, 289 NLRB 942 (1988), *enf'd*, 888 F.2d 1568 (11th Cir. 1989), and 301 NLRB 709 (1991), *enf'd*, 980 F.2d 724 (3d Cir. 1992), the union requested the records of supervisors in conjunction with grievances filed over discipline issued to unit employees. In each case, the Union contended that supervisors engaged in the identical conduct as the unit employees, but received lesser (or no) discipline. Further, in each case, supervisors were subject to the very same rules as unit employees. In these circumstances, the Board viewed the supervisor files to be arguably relevant to the issue of alleged disparate treatment. In *United States Postal Service*, 310 NLRB 701 (1993), however, the Board held that the union was not entitled to supervisor records even though the union alleged that some

supervisors engaged in similar conduct as the employees. The Board emphasized that the burden was on the union to establish relevance and that it failed to do so because its allegations were supported by nothing more than surmise.

Here, Suobra was not disciplined or threatened with discipline, and no issue of disparate treatment was raised. Respondent furnished the Union with information regarding the alleged incident between Suobra and supervisor Lobb, and showed the Union the discipline issued to Lobb. The Union then requested historical disciplinary records of Lobb that were wholly unrelated to the incident in question. This information was water under the bridge, and the Union made no attempt to connect it to any current issue in which the Union had a statutory interest. A general assertion that the Union has a duty to protect employees hardly opens the door to a supervisor's historical personnel information. Respondent requests that the Board affirm the Judge's dismissal of this allegation.

CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint, as amended, be dismissed in its entirety.

Dated this 20th day of January 2017

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing ANSWERING BRIEF by electronic mail on the following parties:

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This the 20th day of January 2017.

s/ Charles P. Roberts III